

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE:)
) MDL No. 13-02419-RWZ
NEW ENGLAND COMPOUNDING PHARMACY)
CASES LITIGATION) Pages 1 - 34
)

MOTION HEARING

BEFORE THE HONORABLE RYA W. ZOBEL
UNITED STATES SENIOR DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 12
Boston, Massachusetts 02210
August 16, 2016, 2:06 p.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER
United States District Court
1 Courthouse Way, Room 3205
Boston, MA 02210
(617) 345-6787

1 A P P E A R A N C E S:

2 FOR THE PLAINTIFFS:

3 KRISTEN A. JOHNSON, ESQ., THOMAS M. SOBOL, ESQ., and
4 EDWARD NOTARGIACOMO, ESQ., Hagens Berman Sobol Shapiro, LLP,
5 55 Cambridge Parkway, Suite 301, Cambridge, Massachusetts, 02142.

6 FREDERIC L. ELLIS, ESQ., Ellis & Rapacki, LLP,
85 Merrimac Street, Suite 500, Boston, Massachusetts.

7 WILLIAM DANIEL LEADER, JR., ESQ., Leader, Bulso & Nolan,
8 PLC, 414 Union Street, Suite 1740, Nashville, Tennessee, 37219.

9 J. SCOTT SEXTON, ESQ., Gentry Locke Rakes & Moore,
P.O. Box 40013, Roanoke, Virginia, 24022-0013.

10 PATRICK THOMAS FENNELL, ESQ., Crandall & Katt,
11 366 Elm Avenue, SW, Roanoke, Virginia, 24016.

12 FOR THE DEFENDANTS:

13 TIMOTHY J. DURKEN, ESQ., Jager Smith, P.C.,
One Financial Center, Boston, Massachusetts, 02111.

14 ALSO PRESENT BY PHONE:

15 CATHY J. BURDETTE, ESQ., Department of Justice, Civil
16 Division.

17

18

19

20

21

22

23

24

25

P R O C E E D I N G S

THE COURT: Good afternoon. Please be seated.

THE CLERK: This is 13-MD-02419, In Re: New England
Compounding.

THE COURT: Good afternoon. As I understand it, we are here to talk about the status of the negotiations with the government about Medicare, in essence, and therefore projecting when distributions can be made from the trust. So I've looked at the papers that have been filed. I think we should start with lead counsel's motion for approval of the agreement, and I have some questions about that; primarily, can the Court -- I guess the Court can provisionally approve even though Justice hasn't said anything yet, but until everybody signed off, I assume the trustee can't carry out her duties.

MR. SOBOL: Okay, both of those things are correct, your Honor. Good afternoon. Tom Sobol for the Plaintiffs' Steering Committee.

THE COURT: So what would be helpful, Mr. Sobol, is if you were to explain the agreement briefly, the status of the several approval requirements, and I guess the effect of Court approval which you just talked about I think are very independent, the conditional approval that will have to be made final when DOJ signs off. Then I would like to hear very briefly from the various plaintiffs' counsel on their motion to compel distribution, and I think those should address those

1 parts of the agreement in particular that deal with opting out
2 and doing their own thing. And if the trustee and the PSC want
3 to respond, I will hear them at that point. That I think takes
4 care of all of the matters. And if somebody who is on phone
5 needs to talk, you'll just have to pipe up, not down.

6 MR. SOBOL: I think also, your Honor, you may also
7 have on the phone a representative from CMS, a Ms. Cathy
8 Burdette.

9 THE COURT: Now, as I understand it, CMS has signed
10 off.

11 MR. SOBOL: They have not yet. All of those people,
12 from CMS to the DOJ, that need to sign off have not yet signed
13 off. That is part of the issue that the parties have.

14 MS. BURDETTE: Your Honor, this is Cathy Burdette for
15 the Department of Justice. That is correct, we do not have
16 final approval, and I would like to make a statement at
17 whatever time is appropriate about that.

18 THE COURT: Before you make your statement, when do
19 you anticipate signing off?

20 MS. BURDETTE: Well, that's the difficult part because
21 we were ready to recommend this memorandum up the chain on
22 Friday to the highest levels of the Department of Justice for
23 approval. However, we have been notified that there's another
24 settlement agreement out there among the private lienholders,
25 and that settlement agreement contradicts our settlement

1 agreement in various material ways that we feel have to be
2 reconciled before we can move this up the chain that changes
3 our agreement significantly.

4 THE COURT: Excuse me. This is an agreement between
5 who and whom?

6 MS. BURDETTE: Between the plaintiffs' counsel and
7 private lienholders, private medical lienholders.

8 MR. SOBOL: If I may, your Honor?

9 THE COURT: Okay. So, Ms. Burdette, we'll hear
10 Mr. Sobol now, in accordance with the agenda that I suggested,
11 and perhaps before we go on to the motion to compel by the
12 Virginia, Tennessee, Michigan, and I've forgotten what else,
13 plaintiffs, maybe you can then respond to Mr. Sobol.

14 MS. BURDETTE: Very well.

15 MR. SOBOL: So, your Honor, I'd like to make a couple
16 of comments regarding the agreement and then hand it over to my
17 colleague, Mr. Notargiacomo, who will go through very briefly
18 just a description to you about how it operates if it goes into
19 effect.

20 First, your Honor, the background of the agreement is
21 that we've been struggling and trying to get an agreement in
22 place so that the tort trustee, Ms. Riley, is in a position to
23 be able to fund the requests and the claims without running the
24 risk of having any exposure to CMS by having improvidently paid
25 off to some of them their payments.

1 THE COURT: You can assume that I've read all this.

2 MR. SOBOL: Okay. And then the other thing I should
3 just say, your Honor, is that there is no provision of the
4 agreement that, as we contemplate it, at least, the plaintiffs
5 contemplate it, in which CMS would not in the meantime process
6 an individual's claim if the individual said, "I don't want
7 anything to do with that agreement. I want to go it on my
8 own." And so from our perspective and the Plaintiffs' Steering
9 Committee's perspective, there hasn't been any reason for CMS
10 not to process those individual liens. In any event, let me
11 hand it over to Mr. Notargiacomo to give an overview of the
12 agreement.

13 THE COURT: Excuse me. If there were an individual
14 processing and that process came to a conclusion, and assuming
15 then the trust could distribute, would it distribute whatever
16 the amount is attributable to that plaintiff, who would then
17 out of that fund pay CMS? Is that how it would work, or would
18 it be withheld?

19 MR. SOBOL: That's probably the way it would happen
20 unless the trustee were directed to pay directly to CMS the
21 funds.

22 THE COURT: This is not part of the agreement,
23 however. I know that the agreement allows opt-outs, but the
24 mechanism wasn't clear to me.

25 MR. SOBOL: It does allow opt-outs. So just so that

1 it's clear, there is an agreement that's in the process of
2 approval for the federal government. That agreement, if it
3 goes into place, still permits people to opt out of that
4 agreement. In the meantime, there are claimants who, even
5 before the agreement reaches finalization, have already made
6 the decision that they want to opt out regardless and do their
7 own individual negotiation even beforehand.

8 Our position, the Plaintiffs' Steering Committee's
9 position is, we have never thought that there would be any need
10 to hold that process up if there was somebody who wanted to be
11 able to do that. And hypothetically, just to answer your
12 question, if a person went through that process with CMS and
13 got a resolution, then their claim would be ready to be paid,
14 and either the tort trustee would either pay Medicare directly
15 or whatever other instructions, you know, were appropriately
16 pending. That's all. But it's my understanding that CMS is
17 not processing those individual claims; instead is waiting for
18 resolution of this agreement.

19 Let me hand it over to Mr. Notargiacomo. And I'd also
20 ask Mr. Notargiacomo to address the issue about a couple of
21 other private health plans who we are reaching an agreement
22 with which Ms. Burdette has raised an issue about.

23 THE COURT: Mr. Notargiacomo?

24 MR. NOTARGIACOMO: Good afternoon, your Honor. Thank
25 you, and I will be brief because you said you've read the

1 papers, and most of what I have to say is summarized briefly in
2 those papers.

3 With respect to the agreement that's been reached in
4 principle with CMS, your Honor, I just want to go through some
5 of the salient points, the first being that a claimant who
6 decided to participate in the resolution that's been worked out
7 between us and CMS would have CMS's claim satisfied by
8 reference to the resolution matrix, which is Exhibit C to our
9 motion for approval. And that is a grid that allows the
10 plaintiff to figure out what percentage of their total payment
11 from the settlement they would pay to CMS to resolve CMS's
12 claim, and that ranges anywhere from 10 percent on the low end
13 to 21.5 percent on the highest end.

14 Now, how do we derive the matrix? The matrix is based
15 on the points that are being awarded to each claimant by the
16 claims administrator under the settlement. You may recall that
17 the plan calls for each claimant to submit something to the
18 claims administrator with documentation based on their level of
19 injury, and whether or not they're in Claims 1 through 7, they
20 are assigned a certain number of points, ranging from a high of
21 I think 60 up to a half point on the low end.

22 In addition to those points, those base points,
23 claimants can apply for upwards adjustments based on their own
24 individual circumstances. The main resolution matrix takes
25 into account two of those upward adjustments: the long-term

1 hospitalization adjustment and the long-term antifungal
2 treatment adjustment. Those are the two adjustments that most
3 closely correlate to increased expenditures by CMS for treating
4 particular claimants.

5 The more LAFT, long-term hospitalization and long-term
6 antifungal treatment the person has, the more likely they are
7 to have higher expenditures and the higher the CMS expenditures
8 would have been for that individual. Therefore, on the matrix,
9 they're assigned a higher percentage of their recovery to pay
10 CMS to resolve the lien, your Honor.

11 A few more salient points. The time period under
12 which a claimant is eligible for Medicare, participates or at
13 least Medicare will -- let me back up. There's a time period
14 in the agreement in which if a person, a claimant is eligible
15 for Medicare, this agreement will apply, and that is
16 September 1, 2012, to May 31, 2013. Anyone who became
17 Medicare-eligible after May 31, 2013, even though Medicare may
18 have had some expenditures on their behalf, will receive the
19 release under this agreement and will not have to pay Medicare
20 to get the release of Medicare.

21 Medicare has also agreed to waive recovery for anyone
22 in Injury Category 7. People in Injury Category 7 are the
23 least injured individuals.

24 THE COURT: The people with the headache.

25 MR. NOTARGIACOMO: Exactly, your Honor. There is

1 also, and I'll talk a little bit more about this in a second,
2 there is also a provision whereby if an individual has a lien
3 both with Medicare and a private insurer, and the lead counsel
4 and the tort trustee has worked out a similar agreement with
5 that private insurer, Medicare has agreed to split the amount
6 that is derived from the matrix with that private insurer to
7 resolve both the private and the public lien for that claimant,
8 so claimants have an opportunity for one single percentage to
9 resolve both Medicare and the private lien.

10 Finally, your Honor, for almost everyone, not everyone
11 but almost everyone, the agreement is optional. They have the
12 opportunity to opt out, and, as Mr. Sobol said, can negotiate
13 their liens on an individual basis, both with CMS or/and with
14 other private insurers if they so desire.

15 THE COURT: And under the agreement, if somebody wants
16 to opt out, can the claimant be paid in the meantime, or does
17 the claimant have to work out some resolution with CMS before
18 they can get paid?

19 MR. NOTARGIACOMO: If the lien is from CMS, your
20 Honor, and the claimant decides to opt out, they would need to
21 show the tort trustee that they have an agreement with CMS, and
22 the tort trustee would then pay CMS those portions under that
23 agreement, and then the rest would go to the claimant.

24 THE COURT: Thank you.

25 MR. NOTARGIACOMO: Finally, let me just address the

1 one point that I think Ms. Burdette made concerning agreements
2 with other private insurers. I had a conversation with
3 Ms. Burdette on Friday about the CMS agreement. We provided
4 her all the exhibits, and that agreement also makes reference
5 to participating lienholders. And we do have a tentative
6 agreement -- it's not a tentative agreement. We have an
7 agreement -- it has not yet been signed but it will be signed
8 shortly -- with Blue Cross-Blue Shield of Tennessee and Blue
9 Cross-Blue Shield of Michigan to resolve liens from those
10 entities on the same basis as with CMS, and provided, I think
11 on Monday, a copy of that agreement to Ms. Burdette. This is
12 the first time I'm hearing that there's some conflict, so we
13 have not worked out those issues, whatever Ms. Burdette or the
14 DOJ sees as a conflict. We don't think there's a conflict,
15 your Honor, but we obviously want to talk to them about that.

16 THE COURT: Is Blue Cross the only private insurer
17 implicated in this?

18 MR. NOTARGIACOMO: There's Blue Cross-Blue Shield of
19 Tennessee and Michigan, and there's one other small claim in
20 Michigan.

21 THE COURT: I mean, is the issues that Ms. Burdette
22 raises with respect to Blue Cross-Blue Shield the same issues
23 that are likely to be raised with respect to other private
24 insurers, or is Blue Cross-Blue Shield in a place of its own?

25 MR. NOTARGIACOMO: Well, they're in a place of their

1 own, in that they have agreed to sign an agreement, your Honor,
2 a written agreement, which is I think what Ms. Burdette is
3 referring to.

4 THE COURT: Okay. Is that it?

5 MR. NOTARGIACOMO: For now, your Honor, unless you
6 have questions.

7 THE COURT: Ms. Burdette, what is the problem?

8 MS. BURDETTE: Well, your Honor, we have been
9 negotiating this agreement for a long time, as I'm sure the
10 plaintiffs have told you that.

11 THE COURT: Yes, too long.

12 MS. BURDETTE: And, you know, when we started
13 negotiating this, we were negotiating on behalf of CMS, and we
14 were pushed and pushed and pushed to be able to include the
15 group health plans or the other private lienholders in our
16 agreement and to then share our percentage with those other
17 lienholders, so we agreed to that. And our agreement provides
18 very specifically the percentage that the person will get out
19 if they're a Medicare-entitled claimant, if they're a GHC,
20 which is an abbreviation for a primary lienholder, and what
21 they would get if they were both Medicare-entitled and
22 GHC-entitled during the period that we're talking about, and we
23 have agreed to those terms.

24 The separate agreement that we only became aware of
25 yesterday does not reflect agreement on certain provisions that

1 we consider material. For instance, in our agreement in
2 Paragraph 2-C, it states the procedure for people who are
3 Medicare-entitled claimants who are also GHC-entitled claimants
4 and how that would work. The draft agreement that is being
5 considered or that is being considered for private lienholders
6 states that in no way does this agreement imply or indicate
7 agreement to provide any money for CMS, or provide any
8 information to any person or entity on which CMS may rely.
9 Well, it's a material part of our contract that we get that
10 information, that the tort trustee provide us with proof that
11 there was another insurer and how much the payment was. And
12 it's also a material part of our agreement that we are paid and
13 get that notice at the same time, and the terms of this other
14 agreement seems to suggest that we will not get proof of the
15 GHC payment at the time that we receive payment but it will be
16 at some other time, which I can't exactly determine from the
17 agreement. And so, you know, what we have here is that the
18 private lienholders are obligated pursuant to the agreement,
19 the tentative settlement agreement that the Court is
20 considering today, which is completely miss-named the CMS
21 agreement because it does include other lienholders, and that's
22 a very material part of it, and we're being asked to agree, you
23 know, without even knowing the terms of this other settlement
24 agreement and how that's going to affect the terms of our
25 agreement, and, quite frankly, we can't do that.

1 THE COURT: What is your position in this? You are at
2 DOJ?

3 MS. BURDETTE: Yes, I'm with the Department of
4 Justice.

5 THE COURT: So you are effectively counsel to --

6 MS. BURDETTE: Yes, we are counsel to CMS, and it's
7 required by statute and regulation that we approve settlements
8 of this magnitude.

9 THE COURT: So is CMS objecting to this language, or
10 are you as counsel objecting?

11 MS. BURDETTE: I'm objecting on behalf of CMS.

12 THE COURT: But is CMS also objecting?

13 MS. BURDETTE: Well, we are their counsel, so, yes,
14 CMS is objecting.

15 MR. NOTARGIACOMO: If I could just address that, your
16 Honor. I think there's a misunderstanding, and I think it may
17 be --

18 THE COURT: Can you hear him? Why don't you sit down.
19 Ms. Burdette, can you hear Mr. Notargiacomo?

20 MS. BURDETTE: Yes. Yes, I can hear him.

21 THE COURT: Okay.

22 MR. NOTARGIACOMO: So with respect to that particular
23 provision, your Honor, I think that's just a miscommunication
24 or an inability of having the time to communicate with
25 Ms. Burdette. The substance of that, I think she's

1 misconstrued that. That portion of the private agreement just
2 says that they're not signing, physically signing onto the CMS
3 agreement, but all the substantive provisions in that private
4 agreement dovetail and are identical to the ones that are
5 agreed to in the CMS agreement. So they are in fact going to
6 provide the information that CMS requires under the CMS
7 agreement to the tort trustee, and the tort trustee in turn
8 will provide CMS all the information that is required of CMS
9 under the CMS agreement.

10 THE COURT: Can plaintiffs make available to Justice
11 the copies of these agreements?

12 MR. NOTARGIACOMO: Yes, your Honor.

13 MS. BURDETTE: I have the agreement. I actually have
14 the agreement. I got it yesterday, and that's what's causing
15 our concern. I mean, for instance, there's also a provision in
16 this other agreement that if GHC, or frankly anyone, decided to
17 opt out of the entire arrangement for a certain batch of
18 claimants if a certain number of those claimants decided to opt
19 out of the agreement, and that's not in our agreement either.
20 I mean, there are material terms here, and all I'm saying is,
21 while we were prepared to send this up the chain to the Justice
22 Department, it's not moving anywhere until we can figure out
23 what the agreement here is, and, you know, how this is going to
24 work out because this is a material problem.

25 MR. NOTARGIACOMO: Your Honor, it's just a matter of

1 us speaking with CMS and working through these issues, and I
2 think that can be done relatively quickly, and we'll do so this
3 afternoon.

4 MS. BURDETTE: Okay, and let me just respond. This is
5 not just a procedural issue as you stated, and this is not an
6 easy issue, and this will not be resolved this afternoon
7 because I'm on vacation currently, calling in from vacation.
8 So this is going to have to be resolved. We're going to have
9 to figure out how it's going to work, okay?

10 THE COURT: When does your vacation end?

11 MS. BURDETTE: Friday.

12 THE COURT: So you can give me a report by next Monday
13 afternoon?

14 MS. BURDETTE: By when?

15 THE COURT: Monday?

16 MS. BURDETTE: Uhm, I suppose we could. I'm not
17 trying to be disagreeable here, but I totally am in doubt about
18 the fact that these disagreements or these contradictions
19 between the two agreements are going to be able to be nailed
20 out in an hour conversation.

21 THE COURT: Mr. Sobol, do you need to say anything?

22 MR. SOBOL: I do, your Honor, because I just want to
23 share with you what I think you've already picked up on, which
24 is that winners are sometimes our own worst enemies, because
25 you can see that the private insurers wanted to be able to do a

1 similar deal with CMS but just couldn't physically get their
2 clients to agree to the same physical document, so we created a
3 mirror version of that agreement and made it applicable to the
4 private parties.

5 THE COURT: Does it include full disclosure to the
6 government of all terms and definitions and all that?

7 MR. SOBOL: I was under the clear impression that it
8 was, and apparently now there are some issues that have arisen
9 with Ms. Burdette, which upon her return from her vacation we
10 will deal with immediately. I will say this, your Honor, that
11 having spoken with other people who have yet to chime in, and I
12 also hear their concerns, if this is not done by September 6,
13 as lead counsel, I'm going to recommend to the PSC to pull the
14 deal because my understanding also is that CMS is not
15 processing individual claims, and at some point we have to say
16 "enough is enough." The lawyers have to be able to work on an
17 agreement and get it done. Otherwise we --

18 THE COURT: Now, do any of plaintiffs' counsel from
19 Tennessee, Virginia, or Michigan -- what's the other one?

20 MR. SEXTON: Indiana.

21 THE COURT: Indiana.

22 MR. SEXTON: Yes, your Honor. Scott Sexton from
23 Virginia. It's a pleasure to be back in the courtroom. I'm
24 speaking here today on behalf of 154 represented Virginia
25 plaintiffs and also delegates of the Indiana, Michigan, and

1 Tennessee plaintiffs who filed similar motions that bring us
2 here today.

3 THE COURT: Now, I very much understand the need for
4 expedition here. Maybe you could address the -- first of all,
5 do you have a problem with the agreement as it was presented to
6 me through the lead counsel?

7 MR. SEXTON: Well, I think we've touched upon the
8 biggest problem with the agreement and one that I don't believe
9 the trustee would ever want to sign at this point, as it is an
10 agreement that you would approve with no limit as to when the
11 government must act. For example, if you approve it today --

12 THE COURT: That's what they're working on.

13 MR. SEXTON: Right -- it could be two years before
14 this thing gets approved.

15 THE COURT: No, no.

16 MR. SEXTON: And Mr. Sobol's comment is one directly
17 to our concern, which is, in sitting back, the Virginia
18 plaintiffs, we have done the math, at least I have in my firm
19 with all of our clients, and to a client, they're each better
20 off to opt out of the deal and just take the traditional
21 Medicare lien reduced for procurement costs. So the standard
22 Medicare process, they would fare much better than they would
23 under this deal. Now, that is probably not true for a great
24 many plaintiffs, and the Plaintiffs' Steering Committee has
25 done a yeoman's job of trying to get the best deal they can for

1 the largest number they can; but in our situation, and I
2 believe in Tennessee and perhaps in some other states, North
3 Carolina perhaps, there are people who definitely will know
4 that they need to opt out of this deal or risk paying two,
5 three times more than they would ordinarily to Medicare. So we
6 represent -- and, now, the gentleman to my right is Bill
7 Leader. He represents the folks from Tennessee, and he is in
8 roughly the same boat, I believe, as we are. But one of the
9 problems that we have had is that it has been extremely
10 frustrating to Virginia lawyers that we cannot even open up
11 claims with CMS, which is the traditional process. When you
12 settle a case, you open a claim with CMS. They must open this
13 claim under regulations, I think it's within 60 days.

14 THE COURT: Is that a provision of the agreement, or
15 is that something that CMS is imposing?

16 MR. SEXTON: That's federal law, and it's something
17 that CMS --

18 THE COURT: It's federal law based on what? They're
19 negotiating they won't pay private claims?

20 MR. SEXTON: No. I'm saying federal law requires CMS
21 to respond to a request to open a claim within 60 days. That's
22 the standard course of events. And in this instance, many
23 Virginia lawyers, in fact all of them, have run into situations
24 where CMS says they will not open the claims, and they send
25 letters to the lawyers in CMS saying, "We are in negotiation

1 with the Plaintiffs' Steering Committee. Direct your questions
2 to Tom Sobol." So that's been very frustrating because that
3 starting point, after you do that starting point, it takes
4 60 days to get a conditional payment letter, and a conditional
5 payment letter is the magic thing you need from CMS.

6 THE COURT: What can I do about that, if anything?

7 MR. SEXTON: Okay, one of the things that you could
8 do, we believe -- you're being asked to approve this
9 settlement, correct? So as the person in charge of approving
10 the settlement, it is our view that you could do several
11 things: First off, the plaintiffs who want to opt out should
12 be allowed to opt out now. In other words, as far as this
13 bickering about what one document says and what another one
14 says and whether they conflict, we literally have clients
15 dying -- I had one die this weekend -- while this process is
16 waiting. Many are elderly, and many, many need the money very
17 desperately. We have clients --

18 THE COURT: I understand all that. I want to
19 understand what I can do.

20 MR. SEXTON: Well, okay, one of the things that we can
21 do is to allow us to opt out now. The way the agreement is
22 written that is before you for approval, I cannot opt my
23 clients out until CMS signs the agreement. I would like for an
24 order to say that I can opt them out now. Now, to his credit,
25 Mr. Sobol has just last week written a letter to CMS asking

1 them to please stop this hold that they have on opening our
2 claims. That's a great first step, but, as we know, the
3 government can do what the government wants to do. And so CMS
4 is free to accept his suggestion that they should move forward
5 or continue in their posture of not opening our claims, but
6 this is a huge problem for people in Virginia and Tennessee and
7 in other states. So that's one thing that we can do.

8 Another thing we can do is to set a deadline, as
9 Mr. Sobol suggested, if there is going to be this endless
10 process. And everyone knows, I think, that CMS has had this
11 final agreement now for six plus weeks in final form. They're
12 either going to sign it or they're not going to sign it, but it
13 shouldn't take an act of Congress to decide whether they are or
14 are not. And so a deadline would make --

15 THE COURT: If it would take an act of Congress, you
16 would be here ten years from now.

17 MR. SEXTON: I know. But it seems reasonable to us,
18 and we have proposed -- and I don't believe we get much
19 pushback from the Plaintiffs' Steering Committee -- that a
20 deadline of September 6 be imposed, at which point CMS will
21 either have signed the agreement or they won't have signed the
22 agreement. And if they're not going to sign the agreement, the
23 deal is off, and everybody is in a situation of essentially
24 opting out. So that is another thing that we have asked.

25 Now, one of the things that we would also like that is

1 not within the agreement, and I'm sure Mr. Sobol can address
2 this, the practicality of it, is that for those of us who do
3 opt out, there is really no -- we would like very much to have
4 within the agreement a provision that specifies how quickly CMS
5 must respond, bearing in mind that we have been kept in a
6 holding pattern now for months and months and months where we
7 could not open claims. What's the benefit of opening a claim?
8 Had we been able to open a claim, we would have conditional
9 payment letters that would tell us the amount of the lien that
10 CMS is claiming.

11 Now, for some of my colleagues, particularly
12 Mr. Leader and others in Tennessee, and I know some of my
13 colleagues in Virginia, they have clients for whom they don't
14 know the actual amount of the Medicare lien, and it's
15 impossible for them to actually calculate it because the
16 healthcare providers are refusing to provide that reimbursement
17 data to them, so they --

18 THE COURT: When you say healthcare providers, you're
19 talking not about CMS but other --

20 MR. SEXTON: Hospitals, hospitals and doctors.

21 THE COURT: I'm sorry?

22 MR. SEXTON: Hospitals would be the healthcare
23 provider. For example, some of my colleagues have asked
24 hospitals to provide them with -- "Tell us what Medicare
25 reimbursed you for these hospital charges," and they have

1 refused, so that lawyer cannot get the lien information from a
2 hospital --

3 THE COURT: I don't have authority to tell the
4 hospitals. They're not the client.

5 MR. SEXTON: Exactly, I think you do. And then --

6 THE COURT: I do have that?

7 MR. SEXTON: I have not had that problem. I know
8 Mr. Leader has had that problem, and I think Mr. Fennell has
9 had that problem as well as others, but we were fortunate in
10 getting our information I guess early on while the cases were
11 still active and pending.

12 So my point is, these people have no data point by
13 which they can judge the proposed deal. As the Plaintiffs'
14 Steering Committee just said, the top percentage bracket for
15 the proposed deal with CMS has claimants paying 21.5 percent of
16 their gross recovery to CMS. Now, whether that's a good deal
17 or not depends upon those claimants knowing what their real
18 lien is in the first place: Is that a reduction or is that an
19 increase? And so people do not have the information to make
20 that call. And so one of the things that I have been asked to
21 request from your Honor are terms by which once a client asks
22 for it from CMS, if you would impose terms in the order that
23 CMS would have to give a conditional payment letter within an
24 expedited time frame. It is typically 60 days is the maximum,
25 and we are requesting 20 days.

1 The next part of that process --

2 THE COURT: What did you call this, a conditional --

3 MR. SEXTON: Conditional payment letter.

4 THE COURT: And that is the letter that says how much
5 Medicare paid on behalf of that claimant?

6 MR. SEXTON: Correct. It's the first letter in the
7 process. Once that is received by any plaintiff's attorney
8 anywhere in the United States, that plaintiff's attorney looks
9 at that document and sees if it contains extraneous charges
10 that are unrelated to the illness at issue. Assuming it is
11 correct, the plaintiff's lawyer then writes back to CMS and
12 says, "Give us a final demand letter." The final demand letter
13 is the one that we would then present to Ms. Riley, the
14 trustee, and say, "Here is what CMS is saying is the final
15 lien." That is an undetermined process as far as the amount of
16 time that takes between when you request it and when you get
17 it.

18 THE COURT: The first time is what under the statute
19 or regulation?

20 MR. SEXTON: Sixty days.

21 THE COURT: Is how much?

22 MR. SEXTON: Sixty days. That's my recollection, and
23 I'm sure --

24 THE COURT: And you want to shorten that?

25 MR. SEXTON: And I would like to shorten that to

1 20 days. And, correspondingly, once we have a conditional
2 payment letter, we would like to shorten the time for a final
3 letter to be 20 days from the date one is requested. And as I
4 understand the regulations, really the only thing that gets
5 added after you have a conditional payment letter are any
6 intervening medical charges related to that illness, so it's
7 not nearly as complicated as getting the conditional payment
8 letter. So those are terms that we would ask the Court to
9 consider as conditions for the approval of the agreement.

10 And, finally, I guess we are looking at the reality of
11 what happens if CMS picks up its balls and just goes home and
12 says, "We don't want to do the deal, and we're not going to do
13 the deal because, you know, these terms are too onerous," and
14 how would you deal with that, and how would the tort trustee
15 deal with that, and how could that possibly relate to the
16 various documents that govern the behavior in this case?

17 Well, first off, if that occurs and if September 6
18 comes and goes and nobody has signed this final agreement, then
19 we believe that the tort trustee should then just satisfy the
20 reporting obligations that are attendant to her under the tort
21 trust agreement, under the plan, and under most of the
22 settlement agreements. What that is, your Honor, when a
23 defendant settles a case that may have a CMS component, the
24 defendant is called a "responsible reporting entity," and that
25 defendant has to then give notice to CMS of the amount of the

1 settlement, the name of the claimant, the claimant's date of
2 birth, things like that, identifying information, so that CMS
3 would then have notice of the fact that there was a potential
4 recovery there. In this instance, I'm almost one hundred
5 percent sure that that has already occurred, but we would need
6 for that box to be checked because otherwise our defendant --

7 THE COURT: Who would check it, CMS?

8 MR. SEXTON: The tort trustee. The tort trustee would
9 just have to tell us, "I have met the reporting obligations."
10 And that is very significant because defendants have that
11 obligation by law.

12 Then what we were suggesting and discussing among the
13 various counsel is that, yes, it is a pain to have to deal with
14 CMS on an individualized basis on all of these claims. It is
15 our belief, and certainly among the people who have filed these
16 motions, Mr. Leader and myself and Mr. Fennell particularly,
17 that we are more than happy to take on that role of negotiating
18 with CMS on these liens. And so we would ask then, within the
19 context of the plan and what it requires, that the tort trustee
20 simply deputize us as her agents for purposes of doing that,
21 and then we go out and we negotiate these liens. In fact, she
22 could even distribute money to plaintiffs' counsel. We do this
23 every day. It happens in law firms across the country. We
24 receive money on behalf of our clients. We hold it in trust.
25 We wait till we have the proper paperwork. We present that

1 paperwork to Ms. Riley as tort trustee, and then we tell her,
2 "Okay, here is the sign-off from CMS, and this is what we
3 propose to distribute," and then we distribute. Perhaps that
4 would be something that would assist in this process because it
5 is not our goal to increase the cost to the tort trustee. It
6 is our goal to simply serve the interest of our clients, who
7 are increasingly frustrated.

8 THE COURT: Mr. Sexton, if the agreement fails, the
9 defendant only has to report what?

10 MR. SEXTON: The defendant only has to report the
11 amount of the settlement and the beneficiary.

12 THE COURT: I mean, by definition, we're now in the
13 contingency that the agreement fails.

14 MR. SEXTON: Correct.

15 THE COURT: I thought that's what you were referring
16 to.

17 MR. SEXTON: Yes, I am.

18 THE COURT: They have to report what at that point?

19 MR. SEXTON: They have to report the amount of the
20 settlement, the settlement that the plaintiffs are going to
21 receive, not the settlement with CMS. I'm sorry, I think
22 that's where I confused you. If the agreement with CMS fails,
23 then one of the obligations of the tort trustee is to stand in
24 the shoes of the defendant and report the amount of the global
25 settlement, the amount of the individual settlement that the

1 individual is going to get --

2 THE COURT: You mean the amount allocated to the
3 individual pursuant to the plan?

4 MR. SEXTON: Correct, correct.

5 THE COURT: Okay.

6 MR. SEXTON: And that would go to CMS, and that's just
7 a -- that's just under regulations that require that. And it's
8 discussed in the plan as, you know, the obligations of
9 responsible reporting entities, RREs under the terms of the
10 plan.

11 THE COURT: So what you're suggesting is that the
12 global settlement be abandoned, that the tort trustee report
13 the amount of the fund and the amount allocable to each
14 claimant to the fund as of now, and that then counsel for the
15 individual plaintiffs in Virginia, et cetera, undertake a
16 negotiation of another agreement, which may or may not go
17 through and that Justice may have to look at also?

18 MR. SEXTON: No. No, what I am suggesting is that
19 Justice doesn't have to look at what happens every day, day in
20 and day out, which is lawyers like me negotiating the actual
21 Medicare lien that applies to their client's recovery.

22 THE COURT: But you're talking about negotiating not
23 as an individual plaintiff but to the entire group of
24 plaintiffs whom you represent?

25 MR. SEXTON: Correct, I'm talking about each of the

1 plaintiffs that I represent, each of the plaintiffs that
2 Mr. Leader --

3 THE COURT: So a separate negotiation as to each?

4 MR. SEXTON: Yes. That's the way we do it. We have
5 to do it individually.

6 THE COURT: How can that possibly be less expensive
7 than what is being negotiated?

8 MR. SEXTON: Well, it is because some of our clients
9 are paying three times as much under the proposed deal.

10 MR. FENNELL: Your Honor, this is Patrick Fennell.
11 I'm also representing plaintiffs in Virginia. It would be less
12 expensive in the end because the tort trustee wouldn't have to
13 expend her resources on it. It would be individual plaintiffs'
14 attorneys who are spending their time to negotiate individual
15 liens with CMS, and we don't get paid for that other than what
16 our contingency fee arrangement is with our clients anyway.

17 MR. SEXTON: Your Honor, my point is -- and I don't
18 want to suggest that anyone here before you is saying that the
19 deal should be scrapped nationally. That was only a
20 contingency in the event that the deal is not signed by
21 September 6, and that deadline we are asking that you impose
22 because the plaintiffs throughout the country are waiting for a
23 resolution on this, and one is either going to happen or not
24 happen within that time period.

25 THE COURT: Let me ask this. Is it Burnette N or

1 Burdette D?

2 MS. BURDETTE: Burdette, it's Burdette with a D.
3 Thank you, your Honor.

4 THE COURT: What is your view about what you just
5 heard?

6 MS. BURDETTE: Well, first of all, under the
7 settlement, defendant's settlement agreement with the
8 Plaintiffs' Steering Committee and the other GHCs, the
9 reporting requirements are raised, but the trustee has no
10 obligation to have to report anything (Indiscernible) of the
11 settlement.

12 Secondly, you know, we have been proceeding as fast as
13 we can approving this settlement. You know, I didn't even have
14 all the attachments to the tentative agreement until last
15 Friday. I just happened to see that -- you know, plaintiffs'
16 counsel referred to Attachment F. I've never seen that before.
17 So, I mean, that's not a material term, I'm not claiming it is,
18 but the point is, you know, these motions have proceeded.
19 There are things that we have just learned that we are
20 concerned about and rightfully so. And contrary to what
21 Mr. Sobol has stated in absolute terms, the other agreement
22 with private lienholders is not a mirror image of this
23 agreement by any stretch. There are paragraphs that are copied
24 into that agreement, I agree, but there are also provisions
25 that conflict. I mean, our agreement or the agreement that you

1 are asked to approve, it includes GHC, it includes private
2 lienholders. They have obligations under this agreement that
3 you're being asked to approve as well as CMS having
4 obligations. This is not just a CMS claim. There have been
5 negotiations with both parties, very long negotiations. And so
6 how can our agreement bind these people if they have a separate
7 agreement that says they're not bound by our agreement? I
8 don't understand that. That's not -- I, frankly, legally don't
9 understand that.

10 THE COURT: Well, I'm not privy to these agreements,
11 and I have no intention of reading them, even if I were.
12 However, it seems to me that given the stress on all parties in
13 this case from this standstill, if you will, I wonder if it
14 would not be possible to let me know by five o'clock next
15 Tuesday that the matter has been finally resolved between the
16 parties. We have another meeting in this case on Thursday. We
17 would have Wednesday then to put it into final shape, and on
18 Thursday it will be announced as being done. Plaintiffs, the
19 individuals who want to opt out will start the opting-out
20 process. CMS will then be able to deal with it, and the whole
21 thing can be done.

22 My experience is that unless I set ridiculous
23 deadlines, it doesn't get done, so I'm setting a ridiculous
24 deadline.

25 MR. SOBOL: I agree.

1 MS. BURDETTE: Your Honor, respectfully, I cannot tell
2 you that our discussions with plaintiffs' counsel will, you
3 know, be resolved by Monday such that we are negotiating final
4 terms to it on Tuesday, and then we have to send our -- you
5 know, then we send up our memo on Tuesday to, you know, the
6 authorities within the Justice Department who have to approve
7 it. So I cannot tell you that this would be approved by next
8 Thursday because I think that's probably optimistic.

9 THE COURT: Well, I'd be optimistic. See what you can
10 do to get it done. I mean, you know, you can futz around
11 forever and ever with language, and I think the emphasis here
12 should be of just getting it done, getting an agreement that is
13 reasonable to all people, that maybe there's a common
14 agreement, that maybe --

15 MS. BURDETTE: Your Honor, I agree with you, and we
16 thought we had that agreement. That's the problem, you know.
17 And it turns out, in terms of this other agreement, it doesn't
18 appear we do have that. That's our only problem here.

19 THE COURT: Mr. Sobol and Mr. Notargiacomo, whoever is
20 negotiating on behalf of the plaintiffs, you need to give a
21 little too maybe. And I hope that you can get together Monday
22 to do this and Tuesday, and that by Wednesday you will have the
23 draft that you can tell me on Thursday is the draft and it's
24 done. If not, then we may have to see what else to do in order
25 to get it done or to abandon it.

1 MR. SOBOL: And we'll also have the lawyers sit
2 privately and holders on the phone with CMS --

3 THE COURT: I'm sorry?

4 MR. SOBOL: We'll also have the lawyers for those
5 private lienholders, Blue Cross-Blue Shield of Tennessee and
6 Michigan, so if there's any issues that they have are resolved.

7 THE COURT: That's a very good idea, and they need to
8 give too in order to make it happen.

9 Ms. Burdette, I understand that this is difficult for
10 you. We called you away during your vacation. I hope you have
11 a good vacation until Monday, and at that point I hope that the
12 matter can be addressed fully and successfully. And I look
13 forward --

14 MS. BURDETTE: Thank you, your Honor, and I hope that
15 too. Thank you.

16 THE COURT: I look forward to hearing from you all on
17 Thursday. And, Ms. Burdette, you're more than welcome to
18 participate on Thursday by telephone as well.

19 MS. BURDETTE: Thank you, your Honor.

20 THE COURT: What else can we do today? Mr. Sobol?

21 MR. SOBOL: Nothing, your Honor.

22 THE COURT: Mr. Sexton?

23 MR. SEXTON: Nothing, your Honor.

24 THE COURT: Anybody else? Thank you all.

25 Oh, Lisa reminded me the hearing is on Wednesday, so

1 we're here on Wednesday, wherever you are on Wednesday. Thank
2 you. Sorry about that.

3 I also wish to thank all counsel.

4 MS. JOHNSON: Thank you, your Honor.

5 (Adjourned, 1:51 p.m.)
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court Reporter,
do hereby certify that the foregoing transcript, Pages 1
through 34 inclusive, was recorded by me stenographically at
the time and place aforesaid in Civil Action No. 13-02419-RWZ,
In Re: New England Compounding Pharmacy Class Litigation, and
thereafter by me reduced to typewriting and is a true and
accurate record of the proceedings.

Dated this 19th day of September, 2016.

/s/ Lee A. Marzilli

LEE A. MARZILLI, CRR
OFFICIAL COURT REPORTER